

Social Media: Cutting Edge Evidence Questions

Presented by:

**Lawrence Morales II
The Morales Firm, P.C.
San Antonio, Texas**



The Three Commandments of Social Media Evidence

- ▶ #1: Thou Shalt Not Underestimate the Relevance of Social Media Evidence
- ▶ #2: Thou Shalt Not Have Social Media Evidence Excluded Based on an Authentication Objection
- ▶ #3: Thou Shalt Not Have Social Media Evidence Excluded Based on a Hearsay Objection





Relevance of Social Media Evidence



300 MM People in U.S.

845 MM Facebook Users

12.7% of U.S. Internet Time Spent on FB

425 MM Users Worldwide Access FB via Mobile Devices

250 Million Photos Uploaded to FB Per DAY



Relevance of Social Media Evidence

facebook



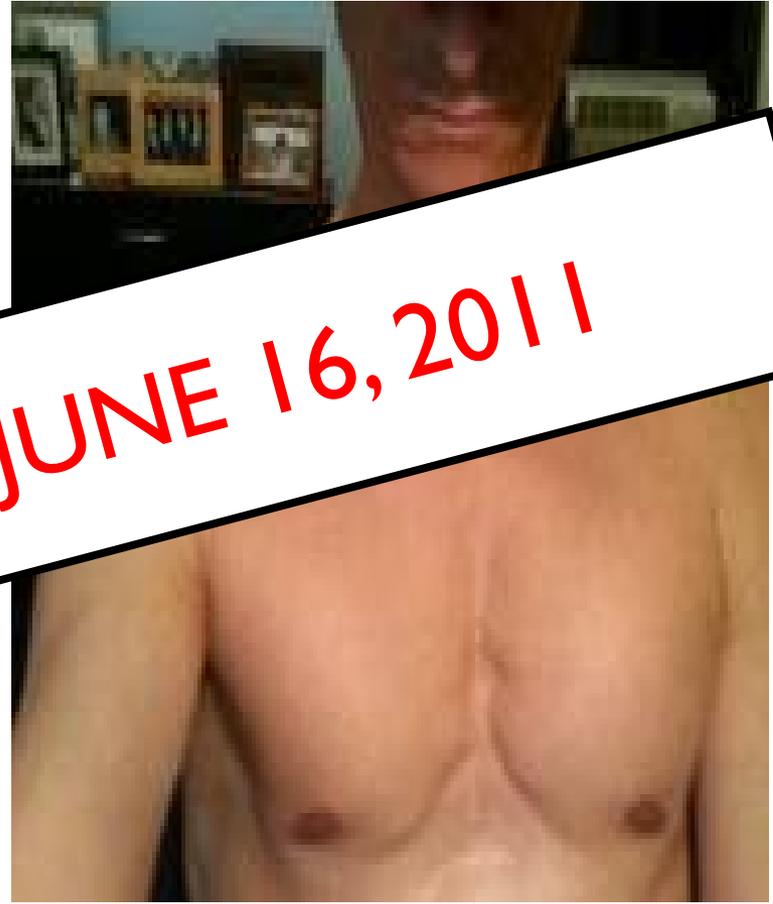
Relevance of Social Media Evidence



RESIGNED ON FEBRUARY 9, 2011



Relevance of Social Media Evidence



RESIGNED ON JUNE 16, 2011



Relevance of Social Media Evidence

Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.



3:17 AM Mar 18th from web



Relevance of Social Media Evidence

-----Original Message-----

From: Kevin Colvin [mailto: kevin.colvin@nyu.edu]

Sent: Wednesday, October 31, 2007 3:55 PM

To: Jill Thompson (North America)

Cc: Paul Davis (North America)

Subject:

Paul/Jill -

I just wanted to let you know that I will not be able to come into work tomorrow. Something came up at home and I had to go to New York this morning for the next couple of days. I apologize for the delayed notice.

Kind regards,

Kevin

From: Paul Davis (North America)

Sent: Thursday, November 01, 2007 4:54 PM

To: Kevin Colvin; Jill Thompson (North America); Kevin Colvin (North America)

Subject: RE:

Kevin,

Thanks for letting us know--hope everything is ok in New York. (cool wand)

Cheers,
PCD



Discoverability of Social Media Evidence

- ▶ **Case:** Personal Injury
- ▶ **Discovery Requests**
 - ▶ “All photographs posted, uploaded, or otherwise added to any social networking sites or blogs, including but not limited to Facebook.com, Myspace.com, Twitter.com, or any similar websites posted since the date of the accident alleged in the Complaint. This includes photographs posted by others in which Plaintiff has been tagged or otherwise identified therein.”
 - ▶ All computers, cell phones, laptops, smart phones, or any similar electronic devices used by, owned by, or in any way accessible by Plaintiff to gain access or post any material on any social networking sites or blogs, including but not limited to Facebook.com, Myspace.com, Twitter.com, or any similar websites.”
- ▶ **Objection:** Not Reasonably Calculated; Overbroad; Invasion of Privacy
- ▶ **Ruling:** Discoverable or Not Discoverable?



Discoverability of Social Media Evidence

- ▶ **Ruling**: Motion to Compel Granted In Part, Denied in Part
- ▶ **Reasoning**
 - ▶ “Generally, [social networking sites] content is neither privileged nor protected by any right of privacy.”
 - ▶ Nevertheless, requests must still be reasonably tailored to issues in case
 - ▶ Plaintiff’s physical condition and “quality of life” are at issue
 - ▶ Court ordered “Plaintiff to produce any photographs depicting her, taken since the date of the subject accident, and posted to a SNS, regardless of who posted them.”
- ▶ **Cite**: *Davenport v. State Farm*, 2012 U.S. Dist. LEXIS 20944 (M.D. Fl. Feb. 21, 2012)



Discoverability of Social Media Evidence

- ▶ **Case:** Slip and Fall
- ▶ **Discovery Requests**
 - ▶ Defendant requested Plaintiff sign authorizations for the release of records from her Facebook account.
- ▶ **Objection:** Not Reasonably Calculated; Overbroad; Invasion Privacy
- ▶ **Ruling:** Discoverable or Not Discoverable?



Discoverability of Social Media Evidence

▶ **Ruling**: Motion to Compel Denied

▶ **Reasoning**

- ▶ “I agree that material posted on a “private” Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy.”
- ▶ “Nevertheless, the Defendant does not have a generalized right to rummage at will through information that Plaintiff has limited from public view.”
- ▶ The public portions of Plaintiff’s FB page “are **not** inconsistent with Plaintiff’s claim of injury or with the medical information she has provided.”

▶ **Cite**: *Tompkins v. Detroit Metro. Airport*, Case No. 10-10413, 2012 U.S. Dist. LEXIS 5749 (E.D. Mich. Jan. 18, 2012).



Discoverability of Social Media Evidence

- ▶ **Case**: Car Accident
- ▶ **Discovery Requests**
 - ▶ Request to produce entire contents of Plaintiff's Facebook and MySpace Accounts
 - ▶ Court directed Plaintiff to provide the Court with log-in information for both accounts to conduct *in camera* review
- ▶ **Objection**: Not Reasonably Calculated; Overbroad; Invasion Privacy
- ▶ **Ruling**: Discoverable or Not Discoverable?



Discoverability of Social Media Evidence

- ▶ **Ruling**: Motion to Compel Granted In Part, Denied In Part
- ▶ **Reasoning**
 - ▶ Court's *in camera* review “reveals that the information and material contained within Plaintiff’s Facebook account are unrelated in any way to the events that give rise to the cause of action in this case, and are largely irrelevant, or not likely to lead to the discovery of admissible evidence.”
 - ▶ Court required production of certain postings potentially inconsistent with Plaintiff’s claims.
 - ▶ Court admonished parties for requiring court to conduct a relevance review.
- ▶ **Cite**: *Offenback v. L.M. Bowman, Inc.*, Civil Action No. 1:10-cv-1789, 2011 U.S. Dist. LEXIS 66432, (M.D. Penn. June 22, 2011).



Discoverability of Social Media Evidence

- ▶ **Case:** Chauvin v. State Farm, Case No. 10-11735, 2011 U.S. Dist. LEXIS 121600 (E.D. Mich. Oct. 20, 2011)
- ▶ **Discovery Requests**
 - ▶ Production of Plaintiff's e-mail address and Facebook account
- ▶ **Objection:** Not Reasonably Calculated; Overbroad; Invasion Privacy
- ▶ **Ruling:** Denied, and **Costs Awarded** to Plaintiff.
 - ▶ “The discovery requested is available to Defendant through less intrusive, less annoying and less speculative means that this, even if it were deemed relevant. There is no indication that granting access to Plaintiff's private Facebook account would be reasonably calculated to lead to the discovery of admissible information.”
 - ▶ Not enough to avoid sanctions that other courts have permitted discovery of social medial evidence.





Social Media Evidence and Personal Injury Cases

▶ Undermine plaintiffs' alleged injuries

- ▶ *Romano v. Steelcase*, 907 N.Y.2d 650 (2010) (allowing discovery of plaintiff's current and historical Facebook and MySpace accounts).
- ▶ *Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535, 2011 WL 2065410 (Pa. Comm. Pl. May 19, 2011) (ordering plaintiff to disclose his usernames, login names and passwords for Facebook and MySpace accounts).
- ▶ *Sedie v. United States*, No. C-08-04417, 2010 WL 1644252, at *23 (N.D. Cal. April 21, 2010) (reducing plaintiff's damages because of information found on MySpace and Facebook).



Social Media Evidence Injury Cases

► Articulating damages in wrong

January 11, 2010 at 12:42pm · Like



Matthew fit in with our family from the very start. He was like a brother to me and a son to my parents. He had a special way of bringing laughter and joy to those who were around him. His personality was contagious and he had a way of putting others at ease...I don't think he ever met a stranger!

There are sooo many good memories...don't know where to start?? I loved the way Matthew made my sister laugh out loud and the sparkle he added to her eye. I love that he made us sing songs out loud in the car at the top of our lungs! One song in particular "Chicken Fried" by Zach Brown Band. Matthew made me listen to the words on repeat 10x with the volume up full blast because he thought it was the "best" song...Can't hear it now without thinking of him with his silly grin singing along.

I love how much he loved America and the people that fought for the freedoms that we now enjoy...how much he respected the older generation for all that they could teach us, how he adored his friends and family...his sweet smile. Most of all I loved that he made my sister truly happy and was such an amazing daddy to kaitlyn. He was the little light bulb/spark plug that made life fun when you were with him. Matthew, we love you and will miss you dearly.

Chicken Fried Lyrics

"Cold beer on a Friday night.

A pair of jeans that fit just right. And the radio up.

Well I've seen the sunrise

See the love in my woman's eyes

Feel the touch of a precious child

And know a mother's love



Wall
Info
Photos

627

people like this

Create a Page

Subscribe via SMS

Subscribe via RSS

Unlike

Report Page

Share

Search

R.I.P Matt

Local Business

Wall

R.I.P Matthew loving · Top Posts

Share: Post Photo Link Video

Write something...



R.I.P M

Matthew & Brandy's beautiful baby!! He would be so proud...

Wall Photos

August 10, 2010 at 2:07pm · Like · Comment · Share

20 people like this.

View all 8 comments



Nicole Hanna awwww she is so cute!
September 23, 2010 at 10:25pm · Like



M.J. Ezar wow I really have never seen her she is beautiful,,god
bless the family,,I love my family
February 6 at 1:03am · Like

Write a comment...



Franklin Shelton

Beautiful Little girl. We all miss you Matt.
May 6 at 5:57pm · Like · Comment



Lee Land Reed

golf is about ready to start up in idaho... miss ya buddy...
March 17 at 2:03pm · Like · Comment



Brian Adkins

Thinking of Matt...

February 5 at 5:39pm · Like · Comment

Becky Barnett likes this.

Write a comment...



Doug DeSive

Think about Matt everytime I hear "Wayman's song".
December 28, 2010 at 3:05pm · Like · Comment

2 people like this.

Write a comment...



Gaby Gorrostieta

luv ya!!!! no me chingues!!!!

December 7, 2010 at 10:17pm · Like · Comment

Laura Schultz McComb likes this.

Write a comment...



Carolann Ruth Taylor

I still have the video on my phone from briggs ranch when I had on the stream
mask and Cayce called you to the kitchen and I popped out of the corner and you

Relevance of Social Media Evidence

- ▶ **Relevance is a low standard (Tex. R. Evid. 401)**
 - ▶ Evidence just has to have “any tendency to make” a material fact “more or less probable” than without evidence
- ▶ **Popularity of social media generates an abundance of potentially relevant evidence**





Commandment #2

**Thou Shalt Not Have Social
Media Evidence Excluded Based
on an Authentication Objection**

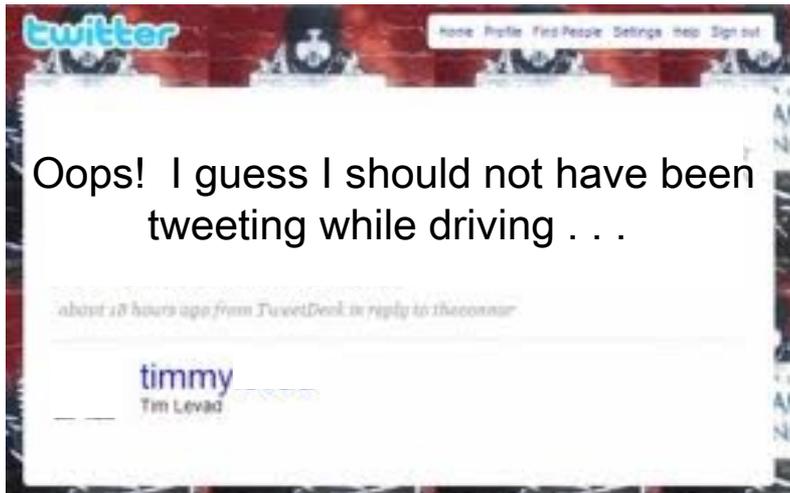


Authentication of Social Media Evidence

- ▶ Rule 901—requires proponent to offer “evidence sufficient to support a finding that the matter in question is what [he] claims.”
 - ▶ Rule 901 “does not erect a particularly high hurdle, and that hurdle may be cleared by circumstantial evidence.” *U.S. v. Chin*, 371 F.3d 31, 37 (2d Cir. 2004).
 - ▶ Proponent does not need to “rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be.” *Id.*
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Authentication of Social Media Evidence





Authentication of Social Media Evidence

- ▶ Rule 104(b)—“When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.”
- ▶ Requires a “foundation from which the jury could reasonably find that the evidence is what the proponent says it is.” *U.S. v. Safavian*, 435 F.Supp. 2d 36, 38 (D.D.C. 2006); see also, *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 541 (D.Md. 2007).





Satisfying Burden Under 104(b)

- ▶ 901(b)(1)—testimony of a witness with knowledge that the evidence is what it is claimed to be.
 - ▶ Social media chats can be authenticated through testimony of the author or recipient.
 - ▶ *U.S. v. Barlow*, 568 F.3d 215 (5th Cir. 2009)
 - ▶ *Talada v. City of Martinez*, 656 F.Supp.2d 1147 (N.D. Cal. 2009).





Satisfying Burden Under 104(b)

- ▶ 901(b)(2)—circumstantial evidence in conjunction with the “appearance, contents, substance, internal patterns, or other distinctive characteristics.”
 - ▶ *People v. Pierre*, 838 N.Y.S.2d 546, 548-49 (2007).
 - ▶ *Dickens v. State*, 927 A.2d 32 (2007)



Satisfying Burden Under 104(b)

- ▶ *Ohio v. Bell*, 882 N.E.2d 502 (2008).
 - ▶ Defense filed motion to exclude printouts of MySpace instant messages
 - ▶ Argued that “MySpace chats can be readily edited after the fact from a user’s homepage.”
 - ▶ Court denied motion, concluding that the chats were properly authenticated through recipient's testimony that:
 - ▶ he had knowledge of the defendant’s MySpace user name;
 - ▶ the printouts appeared to be accurate records of the conversation; and
 - ▶ the communications contained code words known only to defendant and the recipient.





Authenticating Screenshots

▶ Option #1: Direct Testimony

- ▶ Witness with personal knowledge of the website testifies that the printout accurately reflects the content of the website and the image on the computer at which the printout was made.
 - ▶ *Toytrackerz LLC v. Koehler*, No. 08-2297-GLR, 2009 WL 2591329 (D. Kan. Aug. 21, 2009).
 - ▶ *kSolo, Inc. v. Catona*, Nos. 07-5213, 08-1801, 2008 WL 4906115 (C.D. Cal. Nov. 10, 2008).





Authenticating Screenshots

▶ Option #2: Circumstantial Evidence

▶ Griffin v. Maryland, 995 A.2d 791 (2010)

- ▶ Court admits threatening statements on MySpace profile over authentication objection because it contained
 - a picture linking it to the defendant;
 - an accurate birth date;
 - reference to correct number of children; and
 - reference to defendant's nickname.

- ▶ Court provided a limiting instruction that permitted the jury to determine what weight, if any, to place on the evidence.





Authenticating Screenshots

▶ Option #2: Circumstantial Evidence

▶ Griffin v. Maryland, 995 A.2d 791 (2010)

- ▶ “The characteristics of the offered item itself, considered in light of circumstances, afford authentication techniques in great variety, including authenticating an exhibit by showing it came from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him.”
- ▶ There is “no reason why social media profiles may not be circumstantially authenticated in the same manner as other forms of electronic communication—by their content and context.”



Authenticating Social Media Photos

▶ Standard Unsettled

▶ *Lorraine*, 241 F.R.D. 534 (D.Md. 2007).

- ▶ “An original digital photograph may be authenticated the same way as a film photo, by a witness with personal knowledge of the scene depicted who can testify that the photo fairly and accurately depicts it.”

▶ *People v. Lenihan*, 911 N.Y.S.2d 588 (2010)

- ▶ “In light of the ability to ‘photoshop’ and to edit photographs on the computer,” court concluded that defendant failed to authenticate photos.
- ▶ Court noted that proponent did not know who took the photographs or who posted them to MySpace.





Commandment #3

**Thou Shalt Not Have Social
Media Evidence Excluded Based
on a Hearsay Objection**





Social Media As Hearsay

▶ Responses

- ▶ Admission by a party opponent.
 - ▶ Not offered for the truth.
 - ▶ Present sense impression
 - ▶ Then-existing mental, emotional, or physical condition
 - ▶ Excited Utterance
- ▶ “The prevalence of electronic communication devices, and the fact that many are portable and small, means that people always seem to have their laptops, PDA’s, and cell phones with them, and available to use to send e-mails or text messages describing events as they are happening.” *Lorraine*, 241 F.R.D. at 569.



Lawrence Morales II

The Morales Firm, P.C.

210.225.0811

lawrence@TheMoralesFirm.com

Thank you for your time and attention!

